83-307

No.

In the Supreme Court

OF THE

United States

October Term 1983

Ketchikan Pulp Company,
Petitioner,

vs.

Reid Brothers Logging Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether pricing or bidding can be found to be predatory rather than competitive based solely on subjective evidence of intent without any objective analysis whatsoever of a defendant's costs.

2. Whether antitrust injury can be caused by a better-than-competitive price, based solely on subsequent unforeseeable increases in end-product values unrelated to the alleged antitrust misconduct.

3. Whether the courts below erred in finding defendants liable under the antitrust laws based on evidence of alleged conduct well outside the four year statute of limitations period.

STATEMENT REQUIRED BY RULE 28.1

Petitioner Ketchikan Pulp Company was a defendant and appellant below on the issues presented for review.

Louisiana-Pacific Corporation is the parent corporation of Ketchikan Pulp Company.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities

Cases

Table of Authorities

Cases

Constitutional Provisions, Statutes, Rules and Regulations

Constitutional Provisions, Statutes, Rules and Regulations

Other Authorities

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Ketchikan Pulp Company petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on March 1, 1983.

OPINIONS BELOW

The opinions of the divided panel below are reported at 699 F.2d 1292 and are reprinted as Appendix A. The opinion of the district court is not officially published, but is unofficially reported at 1981-2 Trade Cas. (CCH) ¶ 64,228 and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A timely petition for rehearing with suggestion for rehearing in banc was denied by order of May 23, 1983, and the order is reprinted as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. § 1337(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This suit involves application of the federal antitrust laws, specifically, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and Sections 4 and 4b of the Clayton Act, 15 U.S.C. §§ 15 and 15b. The suit also involves the Seventh Amendment to the United States Constitution and Rules 38(d) and 39(a), Fed. R. Civ. P. These provisions are set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

A. Preliminary Statement

The questions addressed in this petition provide the opportunity for this Court to resolve intercircuit conflicts and to clarify the law on important issues in private anti-

trust litigation, including: (1) whether a purely subjective, non cost-based standard can be used to determine the line between predatory and competitive prices or bids; (2) whether antitrust injury can be caused by a better-than-competitive price offer; and (3) whether liability and damages can be based upon evidence well outside the statute of limitations period.[1] These questions are but a few of the serious errors made by the courts below.

This private antitrust action is directed at the timber industry in Southeast Alaska. Plaintiff Reid Brothers Logging Company ("RBLC") accused defendants Ketchikan Pulp Company ("KPC") and Alaska Lumber and Pulp Company ("ALP"), the only two pulp mills in Southeast Alaska, of conspiracy and monopolization with respect to every aspect of that industry. In an attempt to place some focus on plaintiff's broad claims, defendants sought pretrial resolution of the many legal issues, including plaintiff's standing, the statute of limitations, the standards for allegedly "predatory bidding," and whether defendants caused RBLC's claimed injury. RBLC was nevertheless permitted to offer at trial its entire smorgasbord of conflicting claims and evidence. The legal issues were never to be resolved. Even Judge Morrell Sharp's early decision rejecting RBLC's attempt to avoid the statute of limitations by pleading fraudulent concealment was to be ignored.

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[1]Pursuant to Sup. Ct. R. 19.4, KPC incorporates the questions presented and arguments made in Alaska Lumber and Pulp Company's Petition for a Writ of Certiorari from the same judgment on the issues of: (1) whether the refusal to try this case to a jury violated the Seventh Amendment to the United States Constitution and Rules 38(d) and 39(a), Fed. R. Civ. P., and (2) whether a finding of a conspiracy in violation of Section 1 of the Sherman Act can be based on evidence of legitimate social and business contacts and evidence of similar but not consciously parallel conduct.

After more than five years of pretrial proceedings, and due to the illness of Judge Sharp, this action was transferred to Judge Barbara Rothstein immediately before trial. Plaintiff RBLC then withdrew its demand for a jury. Defendant ALP refused to consent to RBLC's last-minute withdrawal and KPC refused to consent to the withdrawal unless all parties agreed. The district court nevertheless refused to allow a trial by jury.

Having ruled that defendants had no right to a jury trial, Judge Rothstein tried the case without a jury over a four-month period. After trial, plaintiff submitted proposed findings of fact and conclusions of law arguing a sweeping conspiracy in existence from the moment KPC and ALP began pulp operations in Southeast Alaska in 1959. The proposed findings were adopted *virtually verbatim* from plaintiff's proposals. Despite the extraordinary breadth of plaintiff's allegations and despite thorough briefing of critical legal issues through pretrial, trial and post trial, *the decision in the district court does not cite a single case or otherwise address any of the legal issues presented.*

The Ninth Circuit voted 2-1 to affirm (Judge Tuttle sitting by designation from the Eleventh Circuit and Chief Judge Browning in the majority; Judge Reinhardt dissenting). Many of the legal issues raised on appeal were ignored by the majority. The findings of antitrust violation are replete with legal error and should not have been sustained. Petitioner is left with conclusory findings of antitrust violation, the scope of which is impossible to determine, which provide no guidance to permissible conduct in the industry.[3]

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[3]Those findings are now being used in Congress and by various interest groups to urge action that could force the defendant mills —which provide the only significant basis for year-round employ-

More important, however, the prejudice of the legal errors below could spread far beyond this industry. The questions raised in this petition go to the heart of private enforcement of the antitrust laws. This petition cannot and does not raise all of the issues that require correction; instead, petitioners raise only those few issues that, consistent with this Court's limited certiorari jurisdiction, provide a unique opportunity for this Court to resolve conflicts between the circuits, to avoid uneven enforcement of the antitrust laws, and to assure that the antitrust laws are not enforced in such a way as to contradict their very purposes.

B. Background of the Timber Industry in Southeast Alaska

Ninety-seven percent of the commercial timber in Southeast Alaska is within the Tongass National Forest; it is owned by the federal government and is controlled through statutes and extensive regulations administered by the United States Forest Service. The timber stands in Southeast Alaska are old and over-mature and are for the most part suited only for the production of pulp. From the early 1900's, the Forest Service sought to establish a pulp-based industry in Southeast Alaska in order to utilize, consistent with federal statutes, regulations and policies, the lower quality timber, as well as to promote a stable population and economy in Alaska. The government's early efforts were unsuccessful; no company was willing to make the capital investment necessary to establish and operate a pulp mill because other regions had significant cost advantages.

In recognition of the competitive disadvantages of timber operations in the remote islands of Southeast Alaska, the

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ment in Southeast Alaska—to close down. *See, e.g.*, Tongass National Forest, *Oversight Hearings Before the Subcommittee on Mining, Forest Management and Bonneville Power Administration of the House Committee on Interior and Insular Affairs*, 98th Cong., 1st Sess. (June 29, 1983).

government promulgated regulations known as the "primary manufacture rule" to require that all timber cut on national forest lands in Alaska be manufactured or processed in Alaska. 36 C.F.R. § 221.25(i)(1975). Without the primary manfacture rule, unprocessed logs would more profitably have been exported directly to Japan, and no mill industry in Alaska could have been established.

As a further inducement to establish pulp mills, the Forest Service planned in the 1940's and offered four 50-year timber supply contracts, which guaranteed a timber supply at a cost enabling competition with the Puget Sound area, contingent upon the building and operation of pulp and other mills in Alaska. The Forest Service awarded the first 50-year pulp contract to petitioner KPC in 1951. The contract explicitly recognized the significant risks KPC was undertaking to establish a new and untested industry under unique and isolated conditions. Although enterprises such as Georgia-Pacific Corporation, St. Regis Paper Company, and U.S. Plywood-Champion Paper, Inc., considered various proposals to establish pulp mills in Alaska, only KPC and, in 1959, co-defendant ALP were willing to undertake the costs and risks involved.

The primary manufacture rule compelled a logger who purchased a National Forest timber sale in Alaska to sell the logs suitable only for pulp to KPC or ALP. KPC and ALP thus became the only market for a substantial proportion of the logs cut in Southeast Alaska; to attain this market position, their only act was to build the first and only pulp mills in Southeast Alaska pursuant to their contracts with the federal government. There has never been any claim, evidence or finding to dispute the fact that KPC's and ALP's operation of the only pulp mills in Alaska is the result of actions and policies of the Forest Service, federal statutes and regulations, and natural conditions in Southeast Alaska.

C. Facts Material to Question 1 Regarding the Ninth Circuit's Subjective Standard for Determining "Predatory" Bidding

KPC's long term contract with the government did not contemplate that it could satisfy all of its log supply requirement for its operations from its contract area. The remainder of KPC's supply was to be obtained from the purchase of smaller, shorter term Forest Service timber sales (called "independent" timber sales) or from the purchase of logs from loggers or other sources.[3] Defendants' supplementation of their timber supply through the bidding process took place in the face of a "chronic shortage of timber that persisted throughout that entire period" (App. A at A-4), with the Forest Service "hard pressed to meet the requirements of the mills." App. B at A-47. Thus, the courts below recognized that defendants had a right and need to bid for timber and that the timber was in short supply.

RBLC claimed that the defendant pulp mills submitted "predatory" bids on certain Forest Service timber sales in 1966-67 against "would-be mill entrants." KPC bid on only two timber sales (in 1966 and 1967) against bidders designated by plaintiff and the courts below as "would-be mill entrants."[4] App. B at A-50. No evidence was presented

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[3]The Forest Service provided for oral auctions for the express purpose of allowing the existing mills and logging operators in Southeast Alaska, all of which were dependent on Forest Service timber, the opportunity to meet their competition openly and to bid to protect their timber supply.

[4]ALP was found to have bid "predatorily" against outsiders on four occasions in 1966 and 1967. Plaintiff RBLC also bid successfully against the same "would-be entrants." None of these mills ever brought any complaint against defendants or RBLC. Had any complaint regarding this bidding in 1966-67 been filed by the "would-be entrants" on the date of RBLC's complaint, it would plainly have been barred by the four year statute of limitations. 15 U.S.C. § 15b. RBLC's claim of a derivative injury from conduct directed at the "would-be entrants" is also time-barred. *See* Section III, *infra*.

that KPC bid to a point where it could not profitably process the timber from those sales. To the contrary, KPC showed that it never bid beyond the point where it could profitably process and sell the wood products from those sales at the price it bid, and that the location of these timber sales relative to existing operations made their acquisition important to those continuing operations.

The only evidence presented by plaintiff was from internal KPC documents which showed that KPC wanted to win, i.e., to bid to protect a timber supply on which it was dependent and as to which there was a chronic shortage. The legal issue raised by these facts was simple: How high could a defendant bid for timber before that bid would be considered unlawful and predatory, rather than lawful and competitive? Avoiding any answer to this question, the Ninth Circuit rejected any objective, cost-based analysis of defendants' bidding and instead condemned that bidding based solely on evidence of defendants' subjective intent to prevail.

D. Facts Material to Question 2 Regarding Cause in Fact as an Element of Private Antitrust Actions

Plaintiff RBLC sold logs from timber sales it owned and sold logging services on timber sales owned by others. RBLC sold logs to KPC, ALP, and other mills, and neither KPC nor ALP ever refused to purchase its logs. RBLC's claim of injury does not rest on any allegation of depressed prices paid for its logs or services. Instead, RBLC's entire claim for injury is based on its transfer of ownership of a timber sale, the Muddy River #3 sale, to KPC in 1972. App. A at A-12.

RBLC purchased the Muddy River #3 timber sale in 1972 without competition. As owner of the timber sale, RBLC then solicited a single price offer for all of the logs from the sale, which RBLC would produce in a two-year period. KPC responded with a single price offer for the

entire production of logs, as did another mill. Due to financial problems unrelated to defendants' conduct, RBLC needed several hundred thousand dollars to finance its logging. RBLC asked KPC for financing and KPC agreed to provide it. As security for the financing, RBLC assigned its rights to the Muddy River #3 sale to KPC (which assignment was approved by the Forest Service at RLBC's request) and entered an agreement with KPC to log the sale as a contract logger.

RBLC had claimed that it lost the ownership of the sale because KPC's offering price in 1972 was less than competitive and kept RBLC from obtaining financing from another source. However, the courts below found that KPC's offer in 1972 was in fact *higher* than the competitive 1972 price. How could a better-than-competitive price cause RBLC to give up ownership to a timber sale?

The majority condemned KPC for failing to *offer*[6] to renegotiate the price annually based on increases or decreases in the end-product (pulp) market. App. A at A-14. The majority recognized, however, that whether such a provision would injure or benefit RBLC depended entirely on whether end-product prices later went up or down. The courts below concluded that KPC's better-than-competitive offer *in 1972* injured RBLC as the result of admittedly unforseeable market increases in *1973* and early *1974*, when

[6]It is undisputed that *RBLC never asked KPC* (or anyone else) whether it would renegotiate the price periodically or whether it would buy less than the entire production. The conclusion that KPC caused RBLC antitrust injury by making the type of offer RBLC requested ignores the law that a plaintiff cannot complain about a term it solicited where it never demanded an offer on any other basis. *See, e.g., Cleary v. National Distillers and Chemical Corp.*, 505 F.2d 695, 697 (9th Cir. 1974).

RBLC claimed it would log the sale, which were caused by the Arab oil embargo. But the majority ignores the critical fact that when the offer was made in *1972*, neither KPC, nor RBLC, nor anyone else, knew whether end-product prices would later rise or fall. The majority's conclusion that KPC's better-than-competitive offer caused RBLC antitrust injury effectively eliminates cause in fact as an element of a private antitrust action.

E. Facts Material to Question 3 Regarding the Disregard of the Statute of Limitations

This case was tried and decided as if there were no statute of limitations period in a private antitrust action involving conspiracy allegations. RBLC first sought to toll the statute by alleging fraudulent concealment. Judge Sharp, however, found that these allegations were without basis, and granted summary judgment for defendants on the issue of fraudulent concealment. Thus, the law should have compelled RBLC to proceed on whatever claims it may have had during the four years between March 13, 1971 and March 13, 1975, the date the complaint was filed. 15 U.S.C. § 15b.

RBLC was nevertheless allowed to take unlimited discovery back to 1959, the first year both KPC and ALP operated in Southeast Alaska. Defendants then filed partial summary judgment motions directed at alleged conduct which took place well outside the limitations period (such as the alleged "predatory bidding" against outside mills). The statute of limitations motions were denied as premature, with Judge Sharp reserving until trial a ruling on whether such pre-limitations period conduct could give rise to damages. Judge Rothstein, who took over for Judge Sharp, never addressed the statute of limitations issues at trial, admitting *all* pre-limitations period evidence offered by plaintiff over defendants' objections. Judge Rothstein's

opinion relied upon one example after another of pre-limitations period evidence (adopted verbatim from plaintiff's proposed findings) and drew no distinction between pre- and post-limitations conduct. The elimination of the statute of limitations was completed by the Ninth Circuit's cursory and erroneous treatment of the issue.

REASONS FOR GRANTING THE WRIT

I

A FINDING OF "PREDATORY" BIDDING BASED SOLELY ON EVIDENCE OF SUBJECTIVE INTENT, WITHOUT ANY COST-BASED EVIDENCE OF PREDATION, IS ANTICOMPETITIVE AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The Ninth Circuit flatly rejected the need to resort to *any* objective cost-based evidence to establish "predatory" bidding or pricing. The majority stated:

> The defendants argue that the district court erred in its finding of predatory bidding since there was no evidence that the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber. This rigid objective test, however, has been rejected by this court as the exclusive means of determining the legality of a particular price or bid, *California [Computer] Products, Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); a more subjective test has been adopted, designed to avoid penalizing an innocent miscalculation and to assure appropriate sanctions against those parties that can accomplish their *evil ends* without violating the rigid criteria of the marginal cost test. *William Inglis et al. v. ITT Continental Baking*, 668 F.2d 1014, 1034 (9th Cir. 1981). Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, *the blind application of a nu-*

> *merical test would only frustrate the intent of the Sherman Act.*

App. A at A-8 n.5 (emphasis added). The majority refers to "the blind application of a numerical test," but here there was *no* application of a numerical test or of any objective evidence whatsoever. KPC submits that it is the cost-blind conclusion of predation based solely on subjective intent, not a carefully applied cost-based test, that "would frustrate the intent of the Sherman Act."

As the Seventh Circuit recently noted in *MCI Communications Corp. v. AT&T,* 708 F.2d 1081, 1113 (7th Cir. 1983), *petition for cert. filed,* 52 U.S.L.W. 3011 (U.S. July 19, 1983) (No. 83-32) ("*MCI*"), courts have nearly unanimously adopted some form of cost-based standard in deciding questions of predation.[6] The Ninth Circuit cases of *California Computer Products, Inc. v. IBM,* 613 F.2d 727 (9th Cir. 1979) ("*CalComp*") and *Janich Bros. v. American Distilling Co.,* 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978) ("*Janich*"), are cited by the Seventh Circuit as reflections of the Ninth Circuit's adoption of an objective test. *MCI,* 708 F.2d at 1113. The majority in the instant case abandons the objective test of the Ninth and other circuits and returns to such "vague formulations" as its reference to defendants' "evil ends" (App. A at A-8

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[6]*See, e.g., Americana Indus. v. Wometco de Puerto Rico, Inc.,* 556 F.2d 625, 628 (1st Cir. 1977); *Northeastern Tel. v. AT&T,* 651 F.2d 76, 87-88 & n.15 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *O. Hommel Co. v. Ferro Corp.,* 659 F.2d 340, 351-353 (3d Cir. 1981), *cert. denied,* 455 U.S. 1017 (1982); *International Air Indus. v. American Excelsior Co.,* 517 F.2d 714, 722-24 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427, 431-432 (7th Cir. 1980); *Superturf, Inc. v. Monsanto Co.,* 660 F.2d 1275, 1281 (8th Cir. 1981); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.,* 551 F.2d 790, 795-797 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977).

n.5), which other courts have criticized as being an outdated method of antitrust analysis that is of "little predictive or precedential value." *MCI*, 708 F.2d at 1113 n.40.

The Ninth Circuit's adoption of a purely subjective test of predatory bidding in this case thus presents this Court with the opportunity to answer two questions:

(1) Must a finding of predatory bidding or pricing be based on *some* analysis of a defendant's costs?

(2) What should that cost-based test be?

With regard to the second question, this Court might prefer to allow the lower courts further time to refine and reach consensus on which particular cost-based test must be applied. Consideration of the first question, however, is imperative at this time.[7] This case presents this Court with the unique opportunity to ratify that some objective cost-based analysis is necessary to condemn a bid or price as predatory rather than competitive and that purely subjective evidence of an intent to win cannot be the basis of a finding of illegality.

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[7]The number of recent opinions addressing predatory pricing and bidding confirms that this is an important question arising with great frequency in the federal courts. Indeed, commentators have referred to "a virtual explosion in the legal and economic literature dealing with predatory pricing." Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). Other petitions for certiorari on related issues of predatory conduct are also pending before this court (*MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3011 (U.S. July 19, 1983) (No. 83-32); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171), although these cases do not so clearly present the threshold question in the instant case of whether *some* objective analysis of a defendant's costs is a necessary element of the test of predatory pricing or bidding.

Predatory pricing or bidding is difficult to distinguish from vigorous price or bid competition.[8] The cost of erroneously condemning such competition as predatory is great: it punishes and therefore chills precisely the behavior the antitrust laws are meant to promote. The less reliable and understandable the test to determine when a price or bid crosses the critical line between competitive and predatory, the greater is the chill on competitive behavior.

In order to determine the line between competitive and predatory bidding or pricing, courts have widely accepted aspects of an objective cost-based test first developed in Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). Professors Areeda and Turner suggested that prices above marginal cost, even if below total cost, should not be considered predatory. In the bidding context, if plaintiff failed to show that a defendant bid to the point where the defendant could not recover its marginal costs in the sale of its end product, plaintiff could not prove that the bidding was predatory rather than competitive. Logically, if a defendant could bid to a point where it could still make money on the incremental unit produced, but the competitor could not make money at that level, defendant is the more cost-

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[8]As the Seventh Circuit stated:

> There is *no rational way* to determine whether predatory pricing has occurred without some comparison between the prices charged and a rigorously defined measure of the cost of production. *A subjective test based wholly upon intent is almost incapable of distinguishing between pro- and anti-competitive price cuts by a monopolist.*

MCI, 703 F.2d at 1112 (*citing* Areeda, *Predatory Pricing,* 49 Antitrust L.J. 897, 899 (1980); R. Posner, *Antitrust Law—An Economic Perspective*, 188 (1976)) (emphasis added).

efficient producer and should prevail in the competitive struggle.

The objective, cost-based test thus ties the question of predatory bidding or pricing to considerations of efficiency. Courts applying a cost-based test to allegations of predatory pricing have rejected the idea that a firm, even a monopolist, must maintain "a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." *Northeastern Tel. v. AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).[9]

Courts have agreed with Areeda and Turner that pricing at marginal cost is the "competitive and socially optimal result." *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *accord, Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). "[F]orcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources. . . ." *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Courts have also found that the objective marginal cost test offers an easily recognizable line which would provide guidance as to permissible behavior to businessmen, courts and enforcement agencies. *See, e.g., MCI*, 708 F.2d 1113, 1116-17. Moreover, when a price exceeds cost there is no danger that a firm is "subsidizing" its price reductions

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[9] *See also Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 433 (7th Cir. 1980) (underpricing a rival is "the essence of competition," not predatory pricing); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 792, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (monopolist had no obligation "to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival"); *Telex Corp. v. IBM*, 510 F.2d 894, 926-28 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

with profits earned in less competitive markets; the fact that prices are above cost means that every sale adds to profits and none needs a subsidy. *Northeastern Tel.*, 651 F.2d at 89; *International Air Indus.*, 517 F.2d at 725.

For the above reasons, the marginal cost test has been adopted or approved in substantial part by the First, Second, Third, Fifth, Seventh, Eighth, and Tenth Circuits. *See* n.6, *supra*. Courts have not uniformly adopted all aspects of the Areeda-Turner analysis and have developed a variety of formulations of the objective cost-based test.[10] These questions regarding refinements in the cost-based test do not arise in the instant case, however, since *no* cost based test was applied to defendants' bidding. Indeed, no evidence of defendants' costs and no evidence of *any* relationship between costs and bidding was ever proffered by plaintiff.

Only the Ninth Circuit in this case and the Sixth Circuit in *Borden, Inc. v. FTC*, 674 F.2d 498 (6th Cir. 1982), *vacated and remanded*, 103 S.Ct. 2115 (1983) (*"Borden"*) have rejected an objective test based on a defendant's costs in favor of a test of predation based on subjective evidence. The majority in *Borden* concluded that a defendant's prices can be found predatory on a showing that they are below a *competitor's* average variable costs. *Id.* at

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[10]Most circuits have indicated that prices above average *total* cost are presumptively, if not *per se*, legal. *See, e.g., MCI*, 708 F.2d at 1123 n. 58; *Northeastern Tel.*, 651 F2.d at 86, 88; *International Air Indus.*, 517 F.2d at 723. *But see Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1386-88 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171). And most circuits treat prices below average variable costs as presumptively illegal. *See, e.g., Northeastern Tel.*, 651 F.2d at 88. With respect to prices above average variable costs but below average total costs, courts have not unanimously accepted the *per se* rule of legality suggested by Professors Areeda and Turner but have instead considered other market factors *in addition to the cost analysis*. *See, e.g., Chillicothe Sand*, 615 F.2d at 432-33.

515-16. Such a rule would forbid prices well above a *defendant's* average variable costs, if the price did not cover the average variable costs of a *competitor,* however inefficient that competitor might be. The Sixth Circuit in *Borden* also relied heavily on "direct evidence of Borden's general intent" to exclude competitors, which evidence was found in various marketing plans and internal documents. *Id.* at 513-14.

The FTC refused, however, to defend this improper test, and successfully urged this Court to vacate the Sixth Circuit's affirmance and to remand for entry of a settlement order. *See* Brief for the FTC Suggesting Mootness (May 2, 1983), reprinted as Appendix E. The FTC recognized that to base a finding of predation on a *competitor's* costs would indeed create "a price umbrella . . . wholly inconsistent with the concept of price competition the Sherman Act was designed to promote" and that the subjective intent earlier relied upon by the FTC to establish predation in fact "simply reflects a purpose to compete in defense of existing market share . . . wholly consistent with zealous competition." Appendix E at A-78; *see also* Proposed FTC Order Modification, 48 Fed. Reg. 9026 (1983). For the same reasons, the Ninth Circuit's new test should be rejected.

The Ninth Circuit betrays the weakness of its own new rule by its citation of evidence of subjective intent which it uses to affirm the district court's erroneous findings. The majority focuses on the Devil's Club No. 2 timber sale and refers to a KPC letter suggesting that KPC "run [the bidding] up on [Alaska Prince] to the point it will really hurt." App. A. at A-7. But *KPC never even bid* on the Devil's Club No. 2 sale. Thus, the test adopted by the Ninth Circuit not only fails to provide an efficiency-related, cost-based test of *conduct,* but it fails to analyze conduct at all. Instead, it punishes as predatory

the expressed intention to defeat a competitor in an announced timber sale bid, even though the defendant never even bids on the sale![11]

The focus of the district court and the majority, perhaps angered by the tone of the documents, resulted in a common error:

> What juries (*and many judges*) do not understand is that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality. A firm of executives sensitized to antitrust problems will not leave any documentary trail of improper intent; one whose executives lack that sensitivity will often create rich evidence of such intent simply by the clumsy choice of words to describe innocent behavior.

R. Posner, *Antitrust Law—An Economic Perspective,* 189-190 (1976)) (emphasis added). Defendants do not deny that this case is marked by "rich evidence" of competitive intent—but that "rich evidence" is a perfect example of blunt and clumsy verbiage used to describe innocent behavior. There could be no better case to manifest the danger of a strictly subjective intent test.[12]

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[11]The remaining evidence of subjective intent cited by the majority is similarly contrary to what the objective evidence shows actually happened. The subjective evidence relied upon was primarily the writings of Arthur Brooks, KPC's timber manager. Mr. Brooks left KPC in 1969, two years before the limitations period. RBLC's reliance upon Mr. Brooks' subjective intent is particularly ironic since RBLC made over a 40% return on its investment while Mr. Brooks was KPC's manager.

[12]"To one not schooled in the niceties of antitrust litigation," the notion that exposure to treble damages under a "statute designed to foster competition" can be predicated on an expressed desire to prevail in a competitive struggle is "difficult to fathom." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093, 1094 (1980) (Rehnquist, J., dissenting), *denying cert.* to 603 F.2d 263 (2d Cir.

That this Court should address this issue now is demonstrated not only by the inter-circuit conflict, but also by the turnabout and inconsistency within the Ninth Circuit. The Ninth Circuit has moved in the last several years from a strict marginal cost-based test (*see, e.g., Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Janich*, 570 F.2d at 857-58; *CalComp*, 613 F.2d at 742-43; *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982)); to a variant of that marginal cost test (*see, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1033-36 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) ("*Inglis*")); to reliance *solely* on evidence of defendant's subjective intent in this case.[15] The Ninth Circuit has declined to reconcile its own intracircuit conflicts on this issue. Despite vigorous disagreement as to the proper test for predation (*see, e.g., Inglis*, 668 F.2d at 1058-59 (Peck, J., dissenting); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377, 1389-91 (9th Cir. 1983) (Lucas, J., concurring), *petition for cert. filed* (August 1, 1983) (No. 83-171)), in banc review has been consistently denied.

At some point the Ninth Circuit must be brought in line with other circuits and with the pro-competitive purposes of the antitrust laws on this issue. The need for rejection of the subjective intent standard adopted by the court below is immediate because it provides no guidance at all in determining whether conduct will later be held to violate the antitrust laws. KPC and ALP must bid for timber to

1979). When the conclusions of the lower courts are inconsistent with the very purposes of the antitrust laws, "this Court cannot remain wholly above the battle." *Id.* at 1096.

[15]Even the majority in *Inglis* rejected exclusive reliance on subjective evidence, stating that "direct evidence of intent alone can be ambiguous and misleading," and "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." 668 F.2d at 1028.

keep their mills operating, but they do not know under what circumstances or to what price they may do so without fear of a treble damage suit. This Court has the opportunity to address and correct the untenable and unfair predatory bidding rule, to resolve the conflict between this rule and the cost-based rules of other circuits, and to assure that Sherman Act enforcement is squared with the purpose of fostering competition.

II

A BETTER-THAN-COMPETITIVE PRICE CANNOT CAUSE ANTITRUST INJURY SOLELY AS A RESULT OF SUBSEQUENT UNFORESEEABLE INCREASES IN END PRODUCT VALUES

RBLC's entire claim of injury rested on its transfer in 1972 of the ownership of a timber sale to KPC. RBLC contended that the critical transfer was caused by an offer by KPC in 1972 to buy the logs at a price alleged to be depressed due to the conspiracy, which prevented RBLC from obtaining financial assistance it needed to retain ownership of the sale. But the district court found that KPC's offer in 1972 was *higher* than the 1972 competitive price. App. A at A-17.

The courts below rationalized their finding that KPC's better-than-competitive offer in 1972 caused RBLC's injury with the novel and erroneous finding that KPC should have offered to renegotiate the price annually based on end product price increases or decreases.[14] Although conclud-

[14] Plaintiff claimed and the district court agreed that defendants *did* negotiate and renegotiate prices based on a loggers' *costs*; such cost-based pricing was deemed illegal. The district court did not find any failure to renegotiate prices based on costs, because KPC unquestionably gave adjustments based on costs—to other loggers as well as *to RBLC on this particular timber sale*. Thus, the only violation of the antitrust laws regarding KPC's 1972 price offer was the absence of an annual renegotiation provision *based on changes in end-product prices*—an unprecedented and unsupportable conclusion.

ing that the absence of such a provision established the fact of damage in 1972 (App. A at A-15), the majority concedes that whether KPC's failure in 1972 to offer to renegotiate the price annually has any adverse impact on RBLC is entirely fortuitous. *Id.* at A-19. The majority states:

> The logger and the mill *may often suffer substantial losses as a result of a falling market* or conditions at the logging site less favorable than anticipated; in other cases, however, market prices may soar or costs may be less than anticipated, and both the mill and the logger will reap an unexpected windfall. Unfortunately for the defendants, it was just such a bonanza that their illegal actions prevented RBLC from enjoying in the rapidly escalating market of 1973-1974.

Id. (emphasis added).

It is clear that the market for wood products rose dramatically after the 1972 price offer (before crashing again in 1974), so that *with hindsight* the district court and the majority could conclude that annual renegotiations based on end-product price changes would have benefitted RBLC. But RBLC was not injured by KPC's offer in 1972; the only "injury" occurred in 1973 and 1974 when and because the market for end product prices soared temporarily due to the Arab oil boycott. Thus, the cause of injury and the *only* thing wrong with the 1972 offer was that the market for end products happened to go up rather than down. The absence of a provision for annual renegotiation based on end product price fluctuations was neutral in 1972; it could not have established the fact of damage.

The majority fails to offer any explanation why, as a matter of law, a two-year contract can be deemed anticompetitive.[15] The new rule that a two-year contract is anticom-

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[15]The Ninth Circuit's cursory treatment of this causation issue is revealed by its citation to evidence of some contracts in the Puget Sound area that were negotiated annually. App. A at A-15. But

petitive is devoid of common sense, let alone evidentiary, legal, or economic support.

This Court has noted that even multi-year requirements and output contracts can have legitimate business purposes:

> Requirements contracts . . . may well be of economic advantage to buyers as well as sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, *they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs,* and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, *give protection against price fluctuations, and —of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibilty of a predictable market.*

Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949) (emphasis added). The offer by KPC and condemned by the courts below afforded these advantages. It assured the buyer of a log supply under what the courts below found were conditions of increasingly acute shortage, and protected it against increases in its raw materials costs. Such a contract correspondingly protected the seller against market declines[16] and facilitated capital expendi-

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the evidence did not show that such contracts were renegotiated *based on end product price fluctuations,* and the evidence did show that some Puget Sound loggers actively sought the protection of long-term contracts.

[16]In condemning Standard Oil's use of exclusive supply contracts, the Court specifically pointed out that Standard's agreements did not afford either party the advantages of certainty as to price because gasoline prices were pegged to a posted price that floated

tures by permitting the seller to make investments in equipment with the confidence that the revenue for serving the capital debt would be forthcoming.[17]

Thus, even in an "unrestrained market" a logger might well prefer to protect itself against the possibility of a falling market by having a two-year contract price.[18] According to the majority's new rule, however, KPC cannot now grant such protection to a logger requesting it without committing an antitrust violation and being liable for treble damages if the market later happens to go up. The majority has mandated that only one type of contract is permissible in this industry—a price renegotiated annually based solely on changes in end-product values—without explanation of why other types of contracts (including contracts renegotiated annually based on costs) are anticompetitive. The new rule is adopted without giving consideration to the significant adverse impact the rule will have

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with the market. 337 U.S. at 306 n.9. Here, KPC was condemned for giving RBLC the advantage of certainty and failing to float its price with the end-product market.

[17]Although finding the evidence "very close" the Ninth Circuit concluded that RBLC could have received financing with a contract renegotiated year-to-year based on end product price fluctuations, but could not get financing when it had the protection of a better-than-competitive price without the risk of a falling market. App. A at A-15. The Ninth Circuit has it backwards; RBLC's ability to obtain financing would be facilitated by protection from a falling market.

[18]In the district court, RBLC in fact made both arguments. It claimed that it should have had annual renegotiations on the Muddy River #3 sale, because the market rose; however, it claimed that KPC should have honored a two-year contract price at a different timber sale in 1971, because the market had dropped and a price based on the end-product market was not as good as the two-year contract price. Thus, plaintiff contended that it was entitled to the benefit of a renegotiable price when the end-product prices increased, but that it had to be protected from market price decreases by a long-term price.

on loggers when, as in recent years, end-product prices of timber products are dramatically depressed.

The majority's rule that an act may or may not be found to be the cause of antitrust injury depending entirely on events that will occur after the act takes place is without precedent or justification.[19] The majority below referred to the "repeated holdings of the Supreme Court that a lightened burden of proof is imposed upon a plaintiff seeking to prove antitrust damages once violations of the law have been established," citing this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). App. A at A-11, A-12 n.10. Whether or not the Ninth Circuit erred in abolishing the distinction between the standards of proving fact and amount of damage,[20] however, even the lighter burden of proof was not met here.

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[19]The new rule that a two-year offer is unlawful and is the cause of antitrust injury *if* the market subsequently goes up also contradicts the long-standing rule that the value of an asset lost as the result of an alleged antitrust violation must be determined as of the time of the loss. *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); *see also Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1969); *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 790-91 (Ct. Cl. 1968). RBLC allegedly lost the ownership of the timber sale in 1972; whether that loss caused it any injury should be determined as of the time of loss in 1972, not based on subsequent events (such as the unexpected increase in end-product values in 1973-74) that could not have had any impact on the loss of the asset in 1972.

[20]This Court has held that the standard of proof for establishing *fact* of damage is stricter than that for establishing *amount* of damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see also J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 791-92 (5th Cir. 1983) (declining to interpret language in this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) as changing the *Story Parchment* distinction between standard of proving fact and amount of damages).

Moreover, the courts below based their conclusion that RBLC was injured on the prices that would have been paid in 1973 and 1974 under conditions of perfect competition, rather than the price that would have been paid in the absence of the allegedly anticompetitive conduct. The "competitive price theory" relied upon by the district court has been expressly rejected, for reasons consistent with the fundamental antitrust principle that a plaintiff is required to prove that damages were caused by the particular *actionable* conduct of defendants found to have violated the antitrust laws. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 297-98 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980). Even assuming that KPC's better-than-competitive price in 1972 did cause the loss of the sale, the court's perfectly competitive price in 1973 and 1974, which was primarily based on end-product price increases caused by the Arab oil embargo, does not measure the profits RBLC lost as the result of defendants' allegedly anticompetitive conduct as the law requires.[21] *See also Northeastern Tel.,* 651 F.2d at 95; *In re IBM Peripheral EDP Devices Antitrust Litigation,* 481 F.Supp. 965, 1019-20

[21]As a result of the failure to proffer evidence of any connection between conduct alleged to be improper and plaintiff's alleged damage, it is impossible to distinguish between the impact of wrongful conduct and the impact of: (1) defendants' natural market power as a result of their unique position as pulp mills; (2) government regulations, statutes and contracts; (3) conduct prior to the statute of limitations period, such as the allegedly predatory bidding in 1966-67; and (4) conduct that is lawful under the proper legal standards, such as defendants' bidding discussed in Section I above. Failure to attribute damages to antitrust misconduct is a serious and recurring problem which can give rise to destructive damage awards unrelated to the misconduct. This issue was recently addressed in a petition for certiorari granted by this Court, though later dismissed, in *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981), *cert. granted sub nom., Weyerhauser Co. v. Lyman Lamb Co.,* 457 U.S. 971 (1982), *cert. dismissed,* 51 U.S.L.W. 3903 (U.S. June 21, 1983) (No. 81-1618).

(N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir. 1983), *petition for cert. filed* (August 1, 1983) (No. 83-171); *Van Dyk Research Corp. v. Xerox Corp.*, 478 F.Supp. 1268, 1316 (D.N.J. 1979), *aff'd*, 631 F.2d 251 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *ILC Peripherals Leasing Corp. v. IBM*, 458 F.Supp. 423, 435-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). No evidence of the relationship between the alleged violations and the "competitive price" was proffered in this case. The conclusion that KPC's offer caused RBLC antitrust injury is legally and factually erroneous.

III

THE COURTS BELOW ERRED IN FINDING INJURY AND DAMAGES BASED UPON EVIDENCE OUTSIDE THE STATUTE OF LIMITATIONS PERIOD

The Ninth Circuit and the district court improperly relied upon a collection of disparate pre-limitations period acts and statements by defendants to find defendants liable. The only conduct within the limitations period identified as causing RBLC injury was the failure of KPC in 1972 to offer to provide for annual renegotiation based on end product price changes. That failure was deemed a violation of the antitrust laws because of the "limited market" faced by RBLC in 1972 due to pre-limitations conduct and because of an "atmosphere" of cooperation between KPC and ALP.[22] App. A at A-25. This combination of pre-limitations period conduct and "atmosphere" effectively reads the statute of limitations out of a conspiracy case.

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[22]This "atmosphere" apparently rendered it unnecessary for RBLC even to ask KPC or ALP for the desired contract term, or thereafter to prove that the absence of that term had any connection whatsoever to the alleged conspiracy.

The dependence upon pre-limitations period evidence to transform otherwise legal conduct into an antitrust violation shows the failure of the courts below to recognize the critical difference between claims of continuing injury from pre-limitations period conduct, on the one hand, and claims of antitrust violative conduct within the limitations period, on the other. In relying upon completed pre-limitations conduct that was alleged to have had a continuing effect into the limitations period, the Ninth Circuit has abandoned controlling decisions of this Court (*e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)) and has created a conflict with decisions of other courts of appeals. *See Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975) ("[A] . . . claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action").

The dilemma created by the Ninth Circuit's approach to the statute of limitations is immediate. If a logger today asks KPC for the protection of a multi-year contract price, and the market for end products happens to go up, the "atmosphere" created by alleged pre-limitations misconduct could still subject KPC to treble damages.

The Ninth Circuit's wide-open reliance on pre-limitation conduct premised on no more than a conclusory finding of an all-encompassing "conspiracy" directly contravenes the language and the strong policy behind the statute of limitations in private antitrust actions. The central purpose behind statutes of limitations generally has always been the avoidance of stale claims and the protection of parties against the prejudice which would result from the disappearance of evidence and the fading of witnesses' memories

over time.[22] *United States v. Oregon Lumber Co.,* 260 U.S. 290, 299-300 (1922) ("The defense of the statute of limitations is not a technical defense, but substantial and meritorious. The great weight of modern authority is to this effect. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary") (citations omitted); *see also United States v. Marion,* 404 U.S. 307, 322-23 n.14 (1971).

The congressional policy in favor of repose in private antitrust suits appears in the congressional debates and reports with respect to the four-year statute. The Report of the Senate Committee on the Judiciary indicates that, in adopting the four-year limitations period and its statutory tolling provisions (15 U.S.C. § 15(b)), Congress was concerned with the fact that:

> [T]he long duration of [private antitrust] proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts.
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> *   *   *
>
> [The Committee] does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws.

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[22]Mr. Brooks, whose internal documents were so heavily relied upon by RBLC, was in his 70's when he testified to events from decades past. His alleged co-conspirator from ALP, Mr. Charles MacDonald, was too ill to be deposed and was deceased at the time of trial. Many government officials responsible for setting up the industry in Southeast Alaska were also either deceased or too infirm to present testimony to counter the innuendo relied upon by plaintiff. The unfairness is multiplied when one considers that the delay was by RBLC's own choice; as Judge Sharp ruled, RBLC had knowledge of these claims more than four years before filing the complaint.

S. Rep. No. 619, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News, 2328, 2333.

Thus, not only does the Ninth Circuit decision undermine the function of the statute of limitations as a statute of repose, create unfairness to litigants caused by the lapse of time, and leave KPC with the impossible and unfair dilemma of conducting its business with the knowledge that even requested, rational conduct can later be condemned under the taint of pre-limitations period actions, but it also has the potential to overburden the already strained federal courts with meritless claims. An improperly enforced statute of limitations makes it difficult for parties to assess with reasonable certainty their potential risks in litigation, thus making settlement difficult, and creates the corresponding potential for strike suits directed at conduct which should otherwise have been long barred from suit.

The Ninth Circuit's approach conflicts with this Court's prior decisions and decisions in other circuits; this Court should take this opportunity to give direction on this important issue.[23]

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[23]The misconstruction of the statute of limitations is not an isolated phenomenon in private antitrust actions. Confronted with the disregard of the statute of limitations in *Berkey Photo,* Justice Rehnquist, dissenting from denial of certiorari, noted:

> I likewise think that the conclusion of the Court of Appeals that significant parts of a defendant's conduct which take place before the statute of limitations period may nonetheless be introduced in evidence is open to serious question under our prior cases.

444 U.S. at 1095. If the admissibility of pre-limitations conduct is suspect and deserving of this Court's attention, surely the unlimited and indiscriminate reliance on such evidence in this case stretching back some 16 *years* before the lawsuit was filed, must be addresseed and condemned.

CONCLUSION

Beyond its unfair impact on the litigants, the decisions in the courts below give no rational guidance for ongoing conduct in an industry vital to the economy of Southeast Alaska. The new rules devised by the Ninth Circuit create inter- and intra-circuit conflicts on the important issues of predatory pricing, the fact of damage, the statute of limitations, the standards for inferring a conspiracy and the right to a jury trial. The Court should take this opportunity to change the aberrant course the Ninth Circuit is taking on these important issues.

Respectfully submitted,

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